SUPREME COURT, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 358

JACK DOUGLAS, ALEXANDER CELESTE, ARTHUR J. O'NEIL AND FRANK CELESTE,
Petitioners,
v.
COMMONWEALTH OF MASSACHUSETTS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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v.

THE COMMONWEALTH OF MASSACHUSETTS,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Petitioners Douglas, Frank Celeste, Alexander Celeste and Arthur J. O'Neil were convicted of various offenses in Suffolk Superior Court for the Commonwealth of Massachusetts. Douglas and O'Neil were convicted of threats to extort. Alexander Celeste was convicted of being an accessory before the fact to such threats. Frank Celeste and Alexander Celeste were convicted for violation of Massachusetts General Laws c. 140, §110, making it a crime for an unlicensed person to conduct a small loan business. Alexander Celeste, Douglas and Arthur O'Neil were convicted of conspiracy to extort. (1968 Mass. Adv. Sh. 641,

P. App. A 21)[1]. On appeal, the Massachusetts Supreme Judicial Court affirmed these convictions. The petition for writ of certiorari in this case seeks to review that decision. This brief is submitted by the Commonwealth of Massachusetts in opposition to the granting of that petition. Respondent does not accept the statement of facts as set forth in the petition. Those material facts which respondent disputes are hereinafter set forth in the reasons submitted for denying this petition.

SUMMARY OF ARGUMENT.

The respondent will argue herein against the granting of certiorari on the grounds that:

(1) The petitioners' convictions may be sustained wholly apart from the single taped conversation admitted in evidence. That tape is largely corroborative of other evidence of the crimes charged. Thus this case is an unsuitable vehicle for deciding the broad constitutional and statutory questions presented in the petition (pp. 3 to 6 *infra*);

(2) This case is factually so different from *On Lee* v. *United States,* 343 U.S. 747, as to make reconsideration of *On Lee* inappropriate in this context, (pp. 6 to 7, *infra*). Not only is the informant here the victim, not the "associate" of the petitioners, but he also was available for cross-examination, unlike the situation presented by *On Lee.* Further, this case provides an inappropriate means for the reconsideration of *On Lee* because these petitioners have placed themselves beyond the scope of any reasonable expectation of privacy under *Katz* v. *United States,* 389 U.S. 347 (pp. 7 to 9, *infra*).

(3) This case raises no substantial issue whatsoever under Sec. 605 of the Federal Communications Act (pp. 9 to 11, *infra*); and

[1] P. App. A, refers to Appendix A of Petitioners' petition for writ of certiorari.

(4) Acceptance of petitioners' arguments would work considerable change in the effect of the Fourth Amendment on laws regulating the use of limited surveillance methods by law enforcement officials. In so doing acceptance would frustrate newly enacted state legislation designed to implement with care the guidelines for electronic surveillance previously set by this Court (pp. 11 to 13, *infra*).

ARGUMENT.

I. The Petitioners' Convictions Are Sustainable Wholly Apart From the Single Taped Conversation Admitted in Evidence.

The petitioners' claims presented to this Court are based wholly on the use and admissibility of a single taped conversation between Sacks and Douglas, recorded on or about October 17, 1966. (Mass. Adv. Sh. 646, P. App. A 26). This was the only taped conversation admitted in evidence, as petitioners concede (P. 2).[2] In this conversation, heard also by Mr. Jordan Ring, Sacks's attorney, and verified by him in court as accurate, Douglas "made demands for payment." So far as the record indicates, this was the sum and substance of the admitted conversation. (Mass. Adv. Sh. 646, P. App. A 26).

It is evident from an examination of the transcript of the trial and of the opinion of the Supreme Judicial Court, *Commonwealth* v. *Douglas*, 1968 Mass. Adv. Sh. 641, P. App A 21, that substantial and comprehensive evidence sufficient to sustain a conviction on each substantive offense had been presented by the District Attorney *before* the recording complained of by the petitioners was played for the jury. Melvin Sacks, the victim and principal state's witness, testified to receiving loans in September, 1963, and November, 1964, and to the process of payment (Mass. Adv. Sh.

[2] "P" refers to the petition for writ of certiorari.

642, P. App. A 22). Altogether, Sacks recalled and testified to eight conversations with Alexander Celeste, Douglas, and O'Neill where physical threats were directed against him and his family. (Mass. Adv. Sh. 643-645, P. App. A 23-25). The final conversation with Douglas prior to the recording occurred on October 15, 1966, and was also heard by Detective McLean who subsequently corroborated Sacks' testimony. (Mass. Adv. Sh. 645, P. App. A 25). The recording, in following the same tone and pattern of earlier conversations developed in Sacks's testimony, laid no new ground for the prosecution. At most it served to corroborate the testimony of Sacks or to enhance his credibility.

The recording in question was made on or about October 17, 1966. (Mass. Adv. Sh. 646, P. App. A 26). Admissible evidence presented relating to events prior to October 17 was more than sufficient to sustain all of the convictions. The Massachusetts Supreme Judicial Court, *inter alia,* recited the following evidence:

(1) Sacks testified that on August 24, 1966, Alexander Celeste struck Sacks in the face and kicked him in the stomach. Further, he told Sacks that "it was a cardinal sin to borrow money from another loan shark while owing one" and that if he "knew what was good for . . . [his] wife and kids," he had better not say anything to anyone from the district attorney's office, (Mass. Adv. Sh. 643, P. App. A 23).

(2) Earlier Alexander Celeste had shown Sacks two sticks of dynamite and said that he would not "think twice about blowing up" Sacks's house, (Mass. Adv. Sh. 643, P. App. A 23).

(3) On August 25 or 26, 1966, Sacks was told by Douglas that he "still owed some money" and that he would "have to make arrangements to pay it." He was subsequently informed by Douglas that "[y]ou better have it. . . . you

should pay it, if you don't want any trouble," (Mass. Adv. Sh. 644, P. App. A 24).

(4) On September 8, 1966, O'Neill told Sacks, "If you don't want to get hurt, you'd better get some money . . . real fast" and Douglas said, "[Y]ou are almost at the end of the road," (Mass. Adv. Sh. 644, P. App. A 24).

(5) On September 14, O'Neill told Sacks, "You'd better have some money or you could be put in the hospital for four or five weeks," (Mass. Adv. Sh. 644, P. App. A 24).

(6) On September 21, Douglas informed Sacks that "When you feel that cold barrel [of a gun] to your head, you'd be surprised how many ways you can think of of coming up with some money." Douglas added, "[Y]our kid must have a long walk . . . from school, and you wouldn't want anything to happen to her knee caps on the way home, would you?" (Mass. Adv. Sh. 644, P. App. A 24).

(7) On October 11 or 12, 1966, Douglas said to Sacks, "I should bust you right in the face right now, but I am not going to. I am going to see what I can do for you, but you'd better have some money in the next day or so." (Mass. Adv. Sh. 645, P. App. A 25).

(8) On October 15, Sacks was again advised by Douglas that he had "better come up with the money." Douglas also stated to Sacks, that "I should have busted you this morning." (Mass. Adv. Sh. 645, P. App. A 25).

Considering the limited significance of the recording in the total context of the record and the weight of all the evidence of the prosecution which preceeded it, petitioners' opening statement that the recording "beyond dispute . . . constituted an important part of the Commonwealth's case and that, if it was improperly admitted, petitioners' convictions cannot stand" (P. 2-3) must be rejected. Thus the questions sought to be raised by the petitioners were

not central to their convictions and therefore do not present an appropriate occasion for this Court's consideration of them.

II. This Case Does Not Present An Appropriate Occasion To Reconsider The Case Of On Lee vs. United States.

The first question presented by the petition for a writ of certiorari is

> "[D]o the Fourth and Fourteenth Amendments to the United States Constitution require prior judicial approval before the police may lawfully record and introduce into evidence the contents of the telephone conversation between the criminal defendant who was unaware that the conversation was being monitored and the person who consented to the installation of the recording device on his telephone?" (P. 5).

Petitioners argue that this case will provide an opportunity for the Court to reconsider its decision in the case of *On Lee* vs. *United States,* 343 U.S. 747 (P. 6).

A. The Facts of This Case Do Not Present an On Lee Situation.

First, it is important to note that neither the petitioners nor the Commonwealth referred to *On Lee* in their briefs before the Supreme Judicial Court, and that the opinion of that Court does not cite, let alone rely upon, the decision of *On Lee.* Thus the *On Lee* claim is being pressed in this Court for the first time.

In *On Lee,* petitioner was convicted of federal narcotics violations. While on bail, pending trial, an old acquaintance and former employee of petitioner entered onto petitioner's business premises and engaged petitioner in conversation. In the course of the conversation petitioner made incriminating statements. Petitioner did not know

that his former employee was an undercover agent and that he was wired for sound. An agent of the Bureau of Narcotics with a receiving set which allowed him to hear the incriminating statements was positioned outside of the premises. A few days later another conversation took place under similar circumstances. At the trial the agent was allowed to testify as to the conversations he heard with aid of his receiving set. This court affirmed, finding no 4th Amendment violation or violation of section 605 of the Federal Communications Act.

Petitioners ingenuously characterize Sacks as a "long time associate and co-worker" of the petitioners here, as analogous to the "associate" situation in *On Lee* (P. 6, 8). From this premise, petitioners state that if certiorari is granted they will ask this Court to apply the rule ennunciated in *Katz* vs. *United States,* 389 U.S. 347 to the effect that petitioner Douglas was "justified" in expecting that his conversation would not be "broadcast to the world" (P. 8-11). Petitioners, however, overlook that Sacks was hardly the "associate" that was present in *On Lee.* Sacks was the victim of threats of extortion, and not the old friend that was engaging in a social conversation as in *On Lee.* Furthermore, Sacks testified in this case and was available for cross examination while the associate in *On Lee* did not testify and was not available for cross examination[3]. Thus the facts of this case are sufficiently different from those of *On Lee* that it is not an appropriate occasion for this Court to consider overruling that decision.

B. The Use of the Taped Conversation is Entirely Consistent with and Supported by Katz v. *United States.*

Petitioners further argue that obviously Douglas expected his conversation be private. Thus they argue that the subjective test of *Katz* is met where the person exhibits

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[3] Petitioners recognize this important difference (P. 8, n. 4).

an expectation of privacy (P. 10 n. 7)[4]. Petitioners will therefore argue, if permitted, whether the second of the two fold test of *Katz* is met, to wit, that the expectation be one that society is reasonably prepared to meet. It is manifestly clear that society is not prepared to recognize the expectation of the underworld that their threats of extortion and intimidation go unheard.[5] Indeed, even the subjective expectation of Douglas that his words would go undivulged was based on petitioners totally inculcating their victim with fear for his own life and that of his family. It hardly seems important to grant the petitioners an opportunity to argue the issue whether or not society is prepared to recognize their expectation as reasonable when the answer is obvious. Of crucial signifiance is the fact that the very action complained of by the petitioners has been authorized by the recently enacted Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351. Section 2511(2)(c) of this Act provides that "[i]t shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communciation, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." Certainly this recently enacted legislation is indicative that society is not prepared to recognize the expectation of petitioners.[6]

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[4] In so doing, petitioners assert that Douglas knew that Sacks did not have an extension line on his home telephone (P. 7), without citing any supporting evidence to that effect.

[5] The petitioners misuse the fact that the recorded conversation constituted in itself a crime. (P. 11, n.8). The Supreme Judicial Court did not hold that such conversations were not entitled to 4th Amendment protection, as such. Rather the criminal nature of the words goes to the reasonableness of an expectation of privacy. See *Commonwealth* v. *Maiani*, 1968 Mass. Adv. Sh. 837 n.5, P. App. B 40 n.5.

[6] Passing on the question posed by the petition would obviously indirectly pass on the constitutionality of the cited provision of the Omnibus Crime Control and Safe Streets Act. While petitioners

This case is more similar to *Lopez* vs. *United States,* 373 U.S. 427, than *On Lee.* In *Lopez,* petitioner was convicted in a Federal District Court of attempting to bribe an internal revenue agent. During the course of a pre-arranged appointment the agent recorded his conversation with petitioner on a pocket wire recorder. At the trial, the agent testified concerning his conversations with petitioner and his testimony was corroborated by admission in evidence of the recording. Petitioner did know that the person he spoke to was an agent. The bribe was made in an attempt to have the agent not report an alleged violation of the internal revenue laws. This court said "[W]e think the *risk* that petitioner took in offering the bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, *whether by faultless memory or mechanical recording*" 373 U.S. 439 (emphasis added.) Likewise persons who use threats to extort run the risk that their victims will enable law enforcement officials reasonable means to overhear those conversations.

Thus, petitioners have placed themselves beyond the scope of any reasonable expectation of privacy under *Katz* v. *United States,* 389 U.S. 347, making a reconsideration of *On Lee,* in the light of *Katz,* wholly unncessary in the context of this case.

III. It Is Manifestly Clear That There Is No Violation of Section 605 Of The Federal Communications Act.

The second question petitioners seek to present is:

"Do section 605 of the Federal Communications Act and the regulations promulgated thereunder require prior

point to some conflict in present decisions, the effect of that conflict and importance to law enforcement in the states is unclear. On the other hand, since the Omnibus Crime Control and Safe Streets Act is of such nation-wide federal importance it would seem far better to review the question directly in a federal context. Recently enacted Massachusetts legislation similarly allows the acts complained of by petitioners without prior judicial authority. Mass. G.L. c. 272, §99 B. 4., inserted by Mass. St. 1968, c. 738, reproduced in Appendix.

judicial approval before the police may lawfully record and introduce into evidence the contents of a telephone conversation between a criminal defendant who was unaware that the conversation was being monitored and a person who consented to the installation of the recording device on his telephone? (P. 5)." In connection with this question they note that this Court's decision in *Rathbun vs. United States,* 355 U.S. 107 has been modified by a regulation which now bars the use of eavesdropping or recording devices without the authorization of all parties engaging in the conversation except operations of any law enforcement office, conducted "under lawful authority" (31 Fed. Reg. 3400, § 15.11). From this they sound the alarm that the Court's guidance is needed as to the meaning of "lawful authority" (P. 17). They argue that the term requires prior judicial approval. However, such an interpretation is unwarranted and not one on which the courts have disagreed.[7] It is manifestly clear that "lawful authority" is used in the context of a law enforcement official discharging his official duties. A phrase similar to "under lawful authority" is used in the recently enacted Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351. This phrase, quoted *supra* at p. 8, provides that it shall not be unlawful for a person acting under *color of law* to intercept a communication with the consent of one of the parties thereto. (Sec. 2511 (2) (c). Congress obviously had no intention of authorizing a law enforcement official to act without judicial approval under the Crime Control Act while creating a violation for the same conduct under the Federal Communications Act.

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[7] To the extent there is a conflict in the circuits on the precise issue of allowing the introduction of the contents of a recorded telephone conversation without prior judicial approval where one person consents to the installation of the recording device on his telephone, the conflict does not center on the interpretation of Sec. 605 of the Federal Communications Act.

Therefore, whether or not there is a violation of Sec. 605 in this context does not present a substantial and important question for the Court's consideration.

IV. Acceptance Of Petitioners' Arguments Would Frustrate Newly Enacted State Legislation Designed To Implement With Care The Guidelines For Electronic Surveillance Previously Set By This Court.

Petitioners' analysis of the events of this case would suggest that they have uncovered an old and nefarious practice which time and the decisions of this Court have rendered unlawful. This analysis, which appears to generate so much momentum for petitioners' arguments, is notably inaccurate. The process of which petitioners complain can be viewed in the light of the most current and responsive legislative enactments.

Unquestionably, this court in the landmark case, *Berger* v. *New York*, 388 U.S. 41, invited state legislation to prohibit and, consistant with the opinion, to allow controlled use of electronic surveillance techniques. At 388 U.S. 63, this Court stated that:

> . . . this Court has in the past, under specific conditions and circumstances, sustained the use of eavesdropping devices. See *Goldman* v. *United States*, 316 U.S. 129; *On Lee* v. *United States*, 343 U.S. 747; *Lopez* v. *United States, supra;* and *Osborn* v. *United States, supra.* In the latter case the eavesdropping device was permitted where the "commission of a specific offense" was charged, its use was "under the most precise and discriminate circumstances" and the effective administration of justice in a federal court was at stake. The States are under no greater restrictions. . . .

In response, the General Court of the Commonwealth of Massachusetts wrote into law a comprehensive bill (see Mass. St. 1968, c. 738, reproduced in the Appendix hereto) which, in covering each point of the decision and beyond, evidenced a cooperation with the spirit as well as the letter of the *Berger* opinion. In good faith and in reliance upon *Berger* and other electronic surveillance cases of this Court cited previously in this brief, the Massachusetts legislature enacted as part of the new law the following provision (c. 272, §99B.4.):

> 4. The term "interception" [made unlawful by the act] means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; *provided that it shall not constitute an interception for an investigative or law enforcement officer . . . to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party* and if recorded or transmitted in the course of an investigation of a designated offense as defined herein. (emphasis supplied)

Other states appear to have responded to *Berger* as well. See, e.g., Chapter 546 of the 1968 Regular New York Session Laws (McKinney's Session Laws News, July 10, 1968) and American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Electronic Surveillance* (Tent. Draft, June, 1968) page 20 n.39. As noted at two earlier points in this brief (p. 8n.6 and p. 10), the federal response to *Berger,* contained in the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, is similarly indirectly in issue in this case.

Petitioners have no present relief available on the strength of current Supreme Court opinions. This emerges as the clear conclusion to be drawn from the authority cited by both respondent and petitioners. Petitioners conceed as much by implication throughout their brief. Thus they argue for overruling *On Lee* v. *United States, supra,* and ask for the extension of *Katz* v. *United States, supra* into an uncharted area. They further base their hopes on the unexpressed views of two Supreme Court Justices (P. 9).

It would be unfortunate indeed for the enlightened and responsive statutory plan which has currently been initiated in Massachusetts to be frustrated by the invocation of the constitutional doctrine espoused by petitioners. The states must be permitted some leeway in their legislative responses to recent constitutional doctrine. *Berger's* invitation in June, 1967, has been accepted by Massachusetts in what we believe is a creative fashion. The occasion for an adjudication by this Court on the merits of claims such as those presented by petitioners should await, we submit, a time at which the operative effects of Mass. St. 1968, c. 738 may be fairly assessed.

CONCLUSION.

For the foregoing reasons it is respectfully urged that the petition for writ of certiorari be denied.

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CRIMES AND PUNISHMENTS—WIRETAPPING AND EAVESDROPPING

CHAPTER 738.

An Act further regulating wiretapping and eavesdropping.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 1. **Chapter 272** of the General Laws is hereby amended by striking out **section 99,** as amended by chapter 449 of the acts of 1959, and inserting in place thereof the following section:

Section 99.

Interception of wire and oral communications.—

A. Preamble.

The general court finds that organized crime exists within the commonwealth and that the increasing activities of organized crime constitute a grave danger to the public welfare and safety. Organized crime, as it exists in the commonwealth today, consists of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services. In supplying these goods and services organized crime commits unlawful acts and employs brutal and violent tactics. Organized crime is infiltrating legitimate business activities and depriving honest businessmen of the right to make a living.

The general court further finds that because organized crime carries on its activities through layers of insulation and behind a wall of secrecy, government has been unsuccessful in curtailing and eliminating it. Normal investigative procedures are not effective in the investigation of illegal acts committed by organized crime. Therefore, law enforcement officials must be permitted to use modern methods of electronic surveillance, under strict judicial supervision, when investigating these organized criminal activities.

The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited. The use of such devices by law enforcement officials must be conducted under strict judicial supervision and should be limited to the investigation of organized crime.

B. Definitions. As used in this section—

1. The term "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception.

2. The term "oral communication," means speech, except such speech as is transmitted over the public air waves by radio or other similar device.

3. The term "intercepting device" means any device or apparatus which is capable of transmitting, receiving, amplifying, or recording a wire or oral communication other than a hearing aid or similar device which is being used to correct subnormal hearing to normal and other than any telephone or telegraph instrument, equipment, facility, or a component thereof, (*a*) furnished to a subscriber or user by a communications common carrier in the ordinary course of its business under its tariff and being used by the subscriber or user in the ordinary course of its business; or (*b*) being used by a communications common carrier in the ordinary course of its business.

4. The term "interception" means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; provided that it shall not constitute an interception for an investigative or law enforcement offi-

cer, as defined in this section, to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.

5. The term "contents", when used with respect to any wire or oral communication, means any information concerning the identity of the parties to such communication or the existence, contents, substance, purport, or meaning of that communication.

6. The term "aggrieved person" means any individual who was a party to an intercepted wire or oral communication or who was named in the warrant authorizing the interception, or who would otherwise have standing to complain that his personal or property interest or privacy was invaded in the course of an interception.

7. The term "designated offense" shall include the following offenses in connection with organized crime as defined in the preamble: arson, assault and battery with a dangerous weapon, extortion, bribery, burglary, embezzlement, forgery, gaming in violation of section seventeen of chapter two hundred and seventy-one of the general laws, intimidation of a witness or juror, kidnapping, larceny, lending of money or things of value in violation of the general laws, mayhem, murder, any offense involving the possession or sale of a narcotic or harmful drug, perjury, prostitution, robbery, subornation of perjury, any violation of this section, being an accessory to any of the foregoing offenses and conspiracy or attempt or solicitation to commit any of the foregoing offenses.

8. The term "investigative or law enforcement officer" means any officer of the United States, a state or a political subdivision of a state, who is empowered by law to conduct investigations of, or to make arrests for, the designated offenses, and any attorney authorized by law to participate in the prosecution of such offenses.

9. The term "judge of competent jurisdiction" means any justice of the superior court of the commonwealth.

10. The term "chief justice" means the chief justice of the superior court of the commonwealth.

11. The term "issuing judge" means any justice of the superior court who shall issue a warrant as provided herein or in the event of his disability or unavailability any other judge of competent jurisdiction designated by the chief justice.

12. The term "communication common carrier" means any person engaged as a common carrier in providing or operating wire communication facilities.

13. The term "person" means any individual, partnership, association, joint stock company, trust, or corporation, whether or not any of the foregoing is an officer, agent or employee of the United States, a state, or a political subdivision of a state.

14. The terms "sworn" or "under oath" as they appear in this section shall mean an oath or affirmation or a statement subscribed to under the pains and penalties of perjury.

15. The terms "applicant attorney general" or "applicant district attorney" shall mean the attorney general of the commonwealth or a district attorney of the commonwealth who has made application for a warrant pursuant to this section.

16. The term "exigent circumstances" shall mean the showing of special facts to the issuing judge as to the nature of the investigation for which a warrant is sought pursuant to this section which require secrecy in order to obtain the information desired from the interception sought to be authorized.

C. Offenses.

1. Interception, oral communications prohibited.

Except as otherwise specifically provided in this section any person who—

willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one half years, or both so fined and given one such imprisonment.

Proof of the installation of any intercepting device by any person under circumstances evincing an intent to commit an interception, which is not authorized or permitted by this section, shall be prima facie evidence of a violation of this subparagraph.

2. Editing of tape recordings in judicial proceeding prohibited.

Except as otherwise specifically provided in this section any person who—

willfully edits, alters or tampers with any tape, transcription or recording of oral or wire communications by any means, or attempts to edit, alter or tamper with any tape, transcription or recording of oral or wire communications by any means with the intent to present in any judicial proceeding or proceeding under oath, or who presents such recording or permits such recording to be presented in any judicial proceeding or proceeding under oath, without fully indicating the nature of the changes made in the original state of the recording, shall be fined not more than ten thousand dollars ($10,000.00) or imprisoned in the state prison for not more than five years or imprisoned in a jail or house of correction for not more than two years or both so fined and given one such imprisonment.

3. Disclosure or use of wire or oral communications prohibited.

Except as otherwise specifically provided in this section any person who—

a. willfully discloses or attempts to disclose to any person the contents of any wire or oral communication, knowing that the information was obtained through interception; or

b. willfully uses or attempts to use the contents of any wire or oral communication, knowing that the information was obtained through interception, shall be guilty of a misdemeanor punishable by imprisonment in a jail or a house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

4. Disclosure of contents of applications, warrants, renewals, and returns prohibited.

Except as otherwise specifically provided in this section any person who—

willfully discloses to any person, any information concerning or contained in, the application for, the granting or denial of orders for interception, renewals, notice or return on an ex parte order granted pursuant to this section, or the contents of any document, tape, or recording kept in accordance with paragraph N, shall be guilty of a misdemeanor punishable by imprisonment in a jail or a house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

5. Possession of interception devices prohibited.

A person who possesses any intercepting device under circumstances evincing an intent to commit an interception not permitted or authorized by this section, or a person who permits an intercepting device to be used or employed for an interception not permitted or authorized by this section, or a person who possesses an intercepting device knowing that the same is intended to be used to commit an interception not permitted or authorized by this section, shall be guilty of a misdemeanor punishable by imprisonment in a jail or house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

The installation of any such intercepting device by such person or with his permission or at his direction shall be prima facie evidence of possession as required by this subparagraph.

6. Any person who permits or on behalf of any other person commits or attempts to commit, or any person who participates in a conspiracy to commit or to attempt to commit, or any accessory to a person who commits a violation of subparagraphs 1 through 5 of paragraph C of this section shall be punished in the same manner as is provided for the respective offenses as described in subparagraphs 1 through 5 of paragraph C.

D. Exemptions.

1. Permitted interception of wire or oral communications.

It shall not be a violation of this section—

a. for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal

course of his employment while engaged in any activity which is a necessary incident to the rendition of service or to the protection of the rights or property of the carrier of such communication, or which is necessary to prevent the use of such facilities in violation of section fourteen A of chapter two hundred and sixty-nine of the general laws; provided, that said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

b. for persons to possess an office intercommunication system which is used in the ordinary course of their business or to use such office intercommunication system in the ordinary course of their business.

c. for investigative and law enforcement officers of the United States of America to violate the provisions of this section if acting pursuant to authority of the laws of the United States and within the scope of their authority.

d. for any person duly authorized to make specified interceptions by a warrant issued pursuant to this section.

2. Permitted disclosure and use of intercepted wire or oral communications.

a. Any investigative or law enforcement officer, who, by any means authorized by this section, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents or evidence in the proper performance of his official duties.

b. Any investigative or law enforcement officer, who, by any means authorized by this section has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may use such contents or evidence in the proper performance of his official duties.

c. Any person who has obtained, by any means authorized by this section, knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any state or in any federal or state grand jury proceeding.

d. The contents of any wire or oral communication intercepted pursuant to a warrant in accordance with the provisions of this section, or evidence derived therefrom, may otherwise be disclosed only upon a showing of good cause before a judge of competent jurisdiction.

e. No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this section shall lose its privileged character.

E. Warrants: when issuable:

A warrant may issue only:

1. Upon a sworn application in conformity with this section; and

2. Upon a showing by the applicant that there is probable cause to believe that a designated offense has been, is being, or is about to be committed and that evidence of the commission of such an offense may thus be obtained or that information which will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit a designated offense may thus be obtained; and

3. Upon a showing by the applicant that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried.

F. Warrants: application.

1. Application. The attorney general, any assistant attorney general specially designated by the attorney general, any district attorney, or any assistant district attorney specially designated by the district attorney may apply ex parte to a judge of competent jurisdiction for a warrant to intercept wire or oral communications. Each application ex parte for a warrant must be in writing, subscribed and sworn to by the applicant authorized by this subparagraph.

2. The application must contain the following:

a. A statement of facts establishing probable cause to believe that a particularly described designated offense has been, is being, or is about to be committed; and

b. A statement of facts establishing probable cause to believe that oral or wire communications of a particularly described person will constitute evidence of such designated offense or will aid in the apprehension of a person who the applicant

has probable cause to believe has committed, is committing, or is about to commit a designated offense; and

c. That the oral or wire communications of the particularly described person or persons will occur in a particularly described place and premises or over particularly described telephone or telegraph lines; and

d. A particular description of the nature of the oral or wire communications sought to be overheard; and

e. A statement that the oral or wire communications sought are material to a particularly described investigation or prosecution and that such conversations are not legally privileged; and

f. A statement of the period of time for which the interception is required to be maintained. If practicable, the application should designate hours of the day or night during which the oral or wire communications may be reasonably expected to occur. If the nature of the investigation is such that the authorization for the interception should not automatically terminate when the described oral or wire communications have been first obtained, the application must specifically state facts establishing probable cause to believe that additional oral or wire communications of the same nature will occur thereafter; and

g. If it is reasonably necessary to make a secret entry upon a private place and premises in order to install an intercepting device to effectuate the interception, a statement to such effect; and

h. If a prior application has been submitted or a warrant previously obtained for interception of oral or wire communications, a statement fully disclosing the date, court, applicant, execution, results, and present status thereof; and

i. If there is good cause for requiring the postponement of service pursuant to paragraph L, subparagraph 2, a description of such circumstances, including reasons for the applicant's belief that secrecy is essential to obtaining the evidence or information sought.

3. Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the facts alleged, it must be so stated. If the facts establishing such probable cause are derived in whole or part from the statements of persons other than the applicant, the sources of such information and belief must be either disclosed or described; and the application must contain facts establishing the existence and reliability of any informant and the reliability of the information supplied by him. The application must also state, so far as possible, the basis of the informant's knowledge or belief. If the applicant's information and belief is derived from tangible evidence or recorded oral evidence, a copy or detailed description thereof should be annexed to or included in the application. Affidavits of persons other than the applicant may be submitted in conjunction with the application if they tend to support any fact or conclusion alleged therein. Such accompanying affidavits may be based either on personal knowledge of the affiant or information and belief, with the source thereof, and reason therefor, specified.

G. Warrants: application to whom made.

Application for a warrant authorized by this section must be made to a judge of competent jurisdiction in the county where the interception is to occur, or the county where the office of the applicant is located, or in the event that there is no judge of competent jurisdiction sitting in said county at such time, to a judge of competent jurisdiction sitting in Suffolk County; except that for these purposes, the office of the attorney general shall be deemed to be located in Suffolk County.

H. Warrants: application how determined.

1. If the application conforms to paragraph F, the issuing judge may examine under oath any person for the purpose of determining whether probable cause exists for the issuance of the warrant pursuant to paragraph E. A verbatim transcript of every such interrogation or examination must be taken, and a transcription of the same, sworn to by the stenographer, shall be attached to the application and be deemed a part thereof.

2. If satisfied that probable cause exists for the issuance of a warrant the judge may grant the application and issue a warrant in accordance with paragraph I. The application and an attested copy of the warrant shall be retained by the

issuing judge and transported to the chief justice of the superior court in accordance with the provisions of paragraph N of this section.

3. If the application does not conform to paragraph F, or if the judge is not satisfied that probable cause has been shown sufficient for the issuance of a warrant, the application must be denied.

I. Warrants: form and content.

A warrant must contain the following:

1. The subscription and title of the issuing judge; and

2. The date of issuance, the date of effect, and termination date which in no event shall exceed thirty days from the date of effect. The warrant shall permit interception of oral or wire communications for a period not to exceed fifteen days. If physical installation of a device is necessary, the thirty-day period shall begin upon the date of installation. If the effective period of the warrant is to terminate upon the acquisition of particular evidence or information or oral or wire communication, the warrant shall so provide; and

3. A particular description of the person and the place, premises or telephone or telegraph line upon which the interception may be conducted; and

4. A particular description of the nature of the oral or wire communications to be obtained by the interception including a statement of the designated offense to which they relate; and

5. An express authorization to make secret entry upon a private place or premises to install a specified intercepting device, if such entry is necessary to execute the warrant; and

6. A statement providing for service of the warrant pursuant to paragraph L except that if there has been a finding of good cause shown requiring the postponement of such service, a statement of such finding together with the basis therefor must be included and an alternative direction for deferred service pursuant to paragraph L, subparagraph 2.

J. Warrants: renewals.

1. Any time prior to the expiration of a warrant or a renewal thereof, the applicant may apply to the issuing judge for a renewal thereof with respect to the same person, place, premises or telephone or telegraph line. An application for renewal must incorporate the warrant sought to be renewed together with the application therefor and any accompanying papers upon which it was issued. The application for renewal must set forth the results of the interceptions thus far conducted. In addition, it must set forth present grounds for extension in conformity with paragraph F, and the judge may interrogate under oath and in such an event a transcript must be provided and attached to the renewal application in the same manner as is set forth in subparagraph 1 of paragraph H.

2. Upon such application, the judge may issue an order renewing the warrant and extending the authorization for a period not exceeding fifteen (15) days from the entry thereof. Such an order shall specify the grounds for the issuance thereof. The application and an attested copy of the order shall be retained by the issuing judge to be transported to the chief justice in accordance with the provisions of subparagraph N of this section. In no event shall a renewal be granted which shall terminate later than two years following the effective date of the warrant.

K. Warrants: manner and time of execution.

1. A warrant may be executed pursuant to its terms anywhere in the commonwealth.

2. Such warrant may be executed by the authorized applicant personally or by any investigative or law enforcement officer of the commonwealth designated by him for the purpose.

3. The warrant may be executed according to its terms during the hours specified therein, and for the period therein authorized, or a part thereof. The authorization shall terminate upon the acquisition of the oral or wire communications, evidence or information described in the warrant. Upon termination of the authorization in the warrant and any renewals thereof, the interception must cease at once, and any device installed for the purpose of the interception must be removed as soon thereafter as practicable. Entry upon private premises for the removal of such device is deemed to be authorized by the warrant.

L. Warrants: service thereof.

1. Prior to the execution of a warrant authorized by this section or any renewal thereof, an attested copy of the warrant or the renewal must, except as otherwise provided in subparagraph 2 of this paragraph, be served upon a person whose oral or wire communications are to be obtained, and if an intercepting device is to be installed, upon the owner, lessee, or occupant of the place or premises, or upon the subscriber to the telephone or owner or lessee of the telegraph line described in the warrant.

2. If the application specially alleges exigent circumstances requiring the postponement of service and the issuing judge finds that such circumstances exist, the warrant may provide that an attested copy thereof may be served within thirty days after the expiration of the warrant or, in case of any renewals thereof, within thirty days after the expiration of the last renewal; except that upon a showing of important special facts which set forth the need for continued secrecy to the satisfaction of the issuing judge, said judge may direct that the attested copy of the warrant be served on such parties as are required by this section at such time as may be appropriate in the circumstances but in no event may he order it to be served later than three (3) years from the time of expiration of the warrant or the last renewal thereof. In the event that the service required herein is postponed in accordance with this paragraph, in addition to the requirements of any other paragraph of this section, service of an attested copy of the warrant shall be made upon any aggrieved person who should reasonably be known to the person who executed or obtained the warrant as a result of the information obtained from the interception authorized thereby.

3. The attested copy of the warrant shall be served on persons required by this section by an investigative or law enforcement officer of the commowealth by leaving the same at his usual place of abode, or in hand, or if this is not possible by mailing the same by certified or registered mail to his last known place of abode. A return of service shall be made to the issuing judge, except, that if such service is postponed as provided in subparagraph 2 of paragraph L, it shall be made to the chief justice. The return of service shall be deemed a part of the return of the warrant and attached thereto.

M. Warrant: return.

Within seven days after termination of the warrant or the last renewal thereof, a return must be made thereon to the judge issuing the warrant by the applicant therefor, containing the following:

a. a statement of the nature and location of the communications facilities, if any, and premises or places where the interceptions were made; and

b. the periods of time during which such interceptions were made; and

c. the names of the parties to the communications intercepted if known; and

d. the original recording of the oral or wire communications intercepted, if any; and

e. a statement attested under the pains and penalties of perjury by each person who heard oral or wire communications as a result of the interception authorized by the warrant, which were not recorded, stating everything that was overheard to the best of his recollection at the time of the execution of the statement.

N. Custody and secrecy of papers and recordings made pursuant to a warrant.

1. The contents of any wire or oral communication intercepted pursuant to a warrant issued pursuant to this section shall, if possible, be recorded on tape or wire or other similar device. Duplicate recordings may be made for use pursuant to subparagraphs 2(*a*) and (*b*) of paragraph D for investigations. Upon examination of the return and a determination that it complies with this section, the issuing judge shall forthwith order that the application, all renewal applications, warrant, all renewal orders and the return thereto be transmitted to the chief justice by such persons as he shall designate. Their contents shall not be disclosed except as provided in this section. The application, renewal applications, warrant, the renewal order and the return or any one of them or any part of them may be transferred to any trial court, grand jury proceeding of any jurisdiction by any law enforcement or investigative officer or court officer designated by the chief jus-

tice and a trial justice may allow them to be disclosed in accordance with paragraph D, subparagraph 2, or paragraph O or any other applicable provision of this section.

The application, all renewal applications, warrant, all renewal orders and the return shall be stored in a secure place which shall be designated by the chief justice, to which access shall be denied to all persons except the chief justice or such court officers or administrative personnel of the court as he shall designate.

2. Any violation of the terms and conditions of any order of the chief justice, pursuant to the authority granted in this paragraph, shall be punished as a criminal contempt of court in addition to any other punishment authorized by law.

3. The application, warrant, renewal and return shall be kept for a period of five (5) years from the date of the issuance of the warrant or the last renewal thereof at which time they shall be destroyed by a person designated by the chief justice. Notice prior to the destruction shall be given to the applicant attorney general or his successor or the applicant district attorney or his successor and upon a showing of good cause to the chief justice, the application, warrant, renewal, and return may be kept for such additional period as the chief justice shall determine but in no event longer than the longest period of limitation for any designated offense specified in the warrant, after which time they must be destroyed by a person designated by the chief justice.

O. Introduction of evidence.

1. Notwithstanding any other provisions of this section or any order issued pursuant thereto, in any criminal trial where the commonwealth intends to offer in evidence any portions of the contents of any interception or any evidence derived therefrom the defendant shall be served with a complete copy of each document and item which make up each application, renewal application, warrant, renewal order, and return pursuant to which the information was obtained, except that he shall be furnished a copy of any recording instead of the original. The service must be made at the arraignment of the defendant or, if a period in excess of thirty (30) days shall elapse prior to the commencement of the trial of the defendant, the service may be made at least thirty (30) days before the commencement of the criminal trial. Service shall be made in hand upon the defendant or his attorney by any investigative or law enforcement officer of the commonwealth. Return of the service required by this subparagraph including the date of service shall be entered into the record of trial of the defendant by the commonwealth and such return shall be deemed prima facie evidence of the service described therein. Failure by the commonwealth to make such service at the arraignment, or if delayed, at least thirty days before the commencement of the criminal trial, shall render such evidence illegally obtained for purposes of the trial against the defendant; and such evidence shall not be offered nor received at the trial notwithstanding the provisions of any other law or rules of court.

2. In any criminal trial where the commonwealth intends to offer in evidence any portions of a recording or transmission or any evidence derived therefrom, made pursuant to the exceptions set forth in paragraph B, subparagraph 4, of this section, the defendant shall be served with a complete copy of each recording or a statement under oath of the evidence overheard as a result of the transmission. The service must be made at the arraignment of the defendant or if a period in excess of thirty days shall elapse prior to the commencement of the trial of the defendant, the service may be made at least thirty days before the commencement of the criminal trial. Service shall be made in hand upon the defendant or his attorney by any investigative or law enforcement officer of the commonwealth. Return of the service required by this subparagraph including the date of service shall be entered into the record of trial of the defendant by the commonwealth and such return shall be deemed prima facie evidence of the service described therein. Failure by the commonwealth to make such service at the arraignment, or if delayed at least thirty days before the commencement of the criminal trial, shall render such service illegally obtained for purposes of the trial against the defendant and such evidence shall not be offered nor received at the trial notwithstanding the provisions of any other law or rules of court.

P. Suppression of evidence.

Any person who is a defendant in a criminal trial in a court of the commonwealth may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom, for the following reasons:

1. That the communication was unlawfully intercepted.

2. That the communication was not intercepted in accordance with the terms of this section.

3. That the application or renewal application fails to set forth facts sufficient to establish probable cause for the issuance of a warrant.

4. That the interception was not made in conformity with the warrant.

5. That the evidence sought to be introduced was illegally obtained.

6. That the warrant does not conform to the provisions of this section.

Q. Civil remedy.

Any aggrieved person whose oral or wire communications were intercepted, disclosed or used except as permitted or authorized by this section or whose personal or property interests or privacy were violated by means of an interception except as permitted or authorized by this section shall have a civil cause of action against any person who so intercepts, discloses or uses such communications or who so violates his personal, property or privacy interest, and shall be entitled to recover from any such person—

1. actual damages but not less than liquidated damages computed at the rate of $100 per day for each day of violation or $1000, whichever is higher;

2. punitive damages; and

3. a reasonable attorney's fee and other litigation disbursements reasonably incurred. Good faith reliance on a warrant issued under this section shall constitute a complete defense to an action brought under this paragraph.

R. Annual report of interceptions of the general court.

On the second Friday of January, each year, the attorney general and each district attorney shall submit a report to the general court stating (1) the number of applications made for warrants during the previous year, (2) the name of the applicant, (3) the number of warrants issued, (4) the effective period for the warrants, (5) the number and designation of the offenses for which those applications were sought, and for each of the designated offenses the following: (*a*) the number of renewals, (*b*) the number of interceptions made during the previous year, (*c*) the number of indictments believed to be obtained as a result of those interceptions, (*d*) the number of criminal convictions obtained in trials where interception evidence or evidence derived therefrom was introduced. This report shall be a public document and be made available to the public at the offices of the attorney general and district attorneys. In the event of failure to comply with the provisions of this paragraph any person may compel compliance by means of an action of mandamus.

Section 1 [2]. **Chapter 166** of the General Laws is hereby amended by adding the following after **section 43:**

Section 44.

Service Observing, Interception.—Service observing of telephone lines conducted by telephone companies for the purpose of determining the quality of transmission or for any other purpose shall cease as soon as a connection is established between the users of the telephone line. Notwithstanding any other law, the line of any subscriber of a telephone company shall not be monitored by a telephone company for the purpose of service observing or random monitoring, if he shall so request in writing to the telephone company. Any subscriber may seek an injunction in the superior court to prevent such service observing or random monitoring.

The department of public utilities shall require that each telephone company file annually with it a complete report of all service observing activity carried on by any telephone company including the number of calls monitored during the previous calendar year, all rules and regulations of the telephone companies for such service observing, a complete description of the location of each service observing facility for each past calendar year, the number of employees engaged in service observing and a statement of the expenses incurred for such service observing to include salaries, cost of capital equipment and maintenance and replacement costs of such

equipment, and administrative expenses incurred. The department shall also conduct periodic inspections at least semiannually of such service observing to determine whether or not it complies with this section and the accuracy of the reports filed. In the event of the failure of any telephone company to comply with this section the department of public utilities must order that the activity cease until compliance is obtained and may seek an enforcement order in the Superior Court of Suffolk County.

Section 3. Section 25 of chapter 147, of the General Laws is amended by adding the following sentences after the last sentence of the first paragraph:

No person convicted of a violation of section ninety-nine or ninety-nine A of chapter two hundred and seventy-two of the general laws shall be granted a license and any license previously granted to such person shall be revoked.

Section 4. Section one hundred of chapter two hundred and seventy-two of the general laws is hereby repealed.

Section 5. Section one hundred and one of chapter two hundred and seventy-two of the general laws is hereby repealed.

Section 6. Section one hundred and two of chapter two hundred and seventy-two of the general laws is hereby repealed.

Section 7. If any provision of this act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Approved July 20, 1968.